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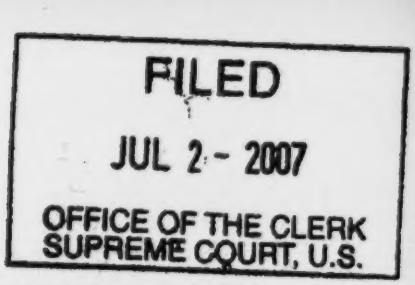

(2)

No. 06-1444

IN THE

Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,
Petitioner,

v.

TIMOTHY P. HEDGECORTH,
Respondent.

On Petition for a Writ of Certiorari
to the Missouri Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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July 2007

QUESTION PRESENTED

Whether the state court of appeals erred in affirming a trial court's application of the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* (FELA), that is consistent with this Court's precedent and does not conflict with any other state or federal courts.

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STATEMENT OF THE CASE

Timothy Hedgecorth, respondent, worked for petitioner Union Pacific (and its predecessor Missouri Pacific) throughout the 1970s and 1980s in an old building owned by the railroads. Pet. App. 6a. Throughout this time, Union Pacific carried out extensive remodeling of the building, which included wholesale removal of asbestos-containing material ("ACM"). *Id.* at 7a. Surveys of the building reflected ACM in poor condition that was easily disturbed, and much of the removal projects took place in and around Mr. Hedgecorth's work station. *Id.* at 6a-7a. The ACM pervaded the air handling system, causing it to be pulled down the pipe chases and then spread throughout the building. *Id.* at 8a.

After working in this environment over three decades, Mr. Hedgecorth was diagnosed with asbestosis, based on specific scarring in the lungs, an appropriate exposure history, and a latency period of over twenty years. *Id.* at 9a. After this diagnosis, Mr. Hedgecorth filed a lawsuit against Union Pacific under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51, *et seq.*, for damages due to personal injuries suffered from his exposure to asbestos. Pet. App. 5a. In his petition, Mr. Hedgecorth requested both general damages and damages for pain and suffering.

At trial, plaintiff's pulmonary specialist described the risks associated with asbestosis, including a significantly enhanced risk of cancer. Pet. App. 9a. Substantial evidence was adduced about Mr. Hedgecorth's reaction to the mention of the cancer by the pulmonologist, his fear of developing an asbestos-related cancer, and his reaction when he did suffer a non-asbestos related cancer. Pet. 5. He testified that he worries about a recurrence of his cancer in light of his incurable asbestosis. *Id.* When he was told by Dr. Ohar of his asbestosis

and the associated increased risk of cancer it "knocked him off his feet." Pet. 5.

The case was tried after *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003), in which the Court held that damages for fear of cancer may be recovered as part of an asbestosis victim's pain and suffering. Despite this holding, Union Pacific sought to have the jury instructed that Mr. Hedgecorth could *not* recover such damages unless the jury determined that such fear was an "actual injury." Pet. App. 81a-83a. And though *Ayers*, 538 U.S. at 149, stated plainly that a "plaintiff suffering bodily harm need not allege physical manifestations of her mental anguish," Union Pacific moved to instruct the jury that it *should* consider physical manifestations of the fear and at least ten (10) other particular actions – none of which find support in *Ayers* – in deciding whether to award damages for the fear of cancer due to Mr. Hedgecorth's medical diagnosis of asbestosis. Pet. App. 81a-83a.

The trial court properly refused these instructions, *id.* at 85a. Instead, the Missouri Approved Instruction ("MAI") damage instruction for FELA cases, MAI 8.02, was given. The jury determined that Union Pacific was eighty percent liable to Mr. Hedgecorth and awarded damages accordingly. Pet. App. 77a. The damages verdict was general, as neither party requested particularized verdict forms. The Missouri Court of Appeals affirmed, after applying FELA and Missouri state law. The court concluded that "*Ayers* does not require not-in-MAI instructions detailing or explaining damages based on a fear of developing cancer." *Id.* at 19a. The court below recognized that *Ayers* allowed fear of cancer damages in an asbestosis case, and that nothing in *Ayers* supported departure from the longstanding maxim that FELA cases tried in state court are governed by state procedural rules. *Id.* at 17a-19a.

REASONS FOR DENYING THE WRIT

The Missouri Court of Appeals opinion in this case is entirely consistent with this Court's FELA jurisprudence. There is no disagreement among the state and federal appellate courts as to the scope of *Ayers*, nor any other reason why a Writ of Certiorari is appropriate in this case. No court has given credence to Union Pacific's novel reading of this Court's *Ayers* decision, which was expressly limited in its holding, as a mandate to all courts to use a particular jury instruction. Even if its reading were credible, the jury instructions requested by Union Pacific in this case contradicted *Ayers*, making this an inappropriate case for review.

A. The Court Below Faithfully Applied *Ayers* and Its Decision is Consistent with Other Courts' Application of FELA.

The Court's holding in *Ayers* did not pertain to jury instructions, but rather to an element of substantive law under FELA. Simply put, the Court examined whether a railroad worker suffering from the compensable disease of asbestosis could recover damages, as part of his "pain and suffering," for his fear of developing cancer. *Ayers*, 538 U.S. at 140. The Court answered in the affirmative, adding that: "It is incumbent upon such complainant, however, to prove that his alleged fear is genuine and serious." *Id.* at 157.

The Court did not hold that a jury must be instructed using the terms "genuine and serious." In fact, the trial court in *Ayers*, which this Court affirmed, did not use either word in its brief jury instruction on fear of cancer damages. The decision in *Ayers* was expressly limited to the substantive issue of whether fear of cancer damages could be recovered by a

plaintiff with asbestosis. The Court stated: "We rule, *specifically and only*, on the question whether this case should be aligned with those in which fear of future injury stems from a current injury, or with those presenting a stand-alone claim for negligent infliction of emotional distress. We hold that the former categorization is the proper one under the FELA." *Id.* at 159 (*emphasis added*).

The Court's only reference to jury instructions was in a footnote addressing concerns raised by the dissent. *Id.* at 158 n.19. The *Ayers* trial involved six separate plaintiffs, and this Court described how in such a case verdict control measures such as particularized verdict forms, jury instructions and motions directed to the sufficiency of the evidence were available to the defendant. *Id.* None of these were at issue in *Ayers*. Of course, the Court's non-exhaustive list of verdict control measures would also include those filed by Union Pacific in this case, e.g., challenge to submissibility of the case, motion for judgment notwithstanding the verdict, Pet. App. 11a, motion for new trial and motion for remittitur. Pet. App. 23a.

Here, the Missouri Court of Appeals recognized the limited holding of *Ayers* when it stated: "[A]lthough the state trial court in *Ayers* had instructed the jury on damages for fear of developing cancer, the Court in *Ayers* did not discuss or authorize jury instructions on this issue, but merely ruled on substantive law. Since the form of instructions is a matter of Missouri law, the *Ayers* holding does not require a change to the form of approved MAI instructions." Pet. App. 19a.

The Court in *Ayers* did not state and could not have intended that a "genuine and serious" instruction must be given in all courts in the state and federal systems, which have their own unique methods of instructing juries. This would effect a

sea change in the way courts consider FELA claims, and no case cited by Union Pacific or found by respondent has suggested *Ayers* requires this practice.

While *Ayers* was not a case about FELA jury instructions, as Union Pacific contends, the cases cited by the Court in support of its holding, 538 U.S. at 150, support denial of the petition before the Court. For example, in *Wolff v. A-One Oil, Inc.*, 627 N.Y.S.2d 788, 789 (N.Y. 1995), the court stated that "under prevailing law, in order to maintain a cause of action for 'fear of [developing] cancer' following exposure to a toxic substance like asbestos, a plaintiff must establish both that he was in fact exposed to the disease-causing agent and that there is a 'rational basis' for his fear of contracting the disease." The court went on to find that such a "rational basis" could be supplied by "some indication of asbestos-induced disease." *Id.* The substantial evidence presented by Mr. Hedgecorth easily satisfies such a standard.

In *Coffman v. Keene Corp.*, 608 A.2d 416, 424 (N.J. Super. 1992), also cited in *Ayers*, the court upheld an award for fear of cancer damages based on testimony that the plaintiff's asbestosis was progressive and untreatable and that his lungs were permanently scarred. Plaintiff testified to his fright at hearing the diagnosis, and that his fright was magnified by the fact that his brother-in-law had physically wasted and died from asbestosis-related cancer. *Id.* This is akin to Mr. Hedgecorth, who having suffered through a non-asbestosis cancer knows first-hand how devastating and frightening cancer can be.

Like the Missouri Court of Appeals here, federal and state courts have applied *Ayers* consistently. For plaintiffs like Mr. Hedgecorth who suffer asbestosis and a reasonable fear of cancer, damages are allowed. *See, e.g., Enigwe v. United*

States, 2006 WL 2349992 (N.D. Ohio) (plaintiffs entitled to fear of cancer damages "inasmuch as they were suffering from the actionable injury asbestosis caused by work-related exposure to asbestos," and such damages could be obtained "without proof of *physical manifestations* of the claimed emotional distress, ...") (*emphasis added*); *Jones v. CSX Transp.*, 337 F.3d 1316, 1317 (11th Cir. 2003) (objective manifestations of emotional distress not required under *Ayers*). For plaintiffs without the conditions suffered by Mr. Hedgecorth, fear of cancer damages have been disallowed. *See, e.g., Campbell v. CSX Transp.*, 892 So.2d 923, 927-28 (Ala. Cir. App. 2004) (summary judgment against FELA plaintiff who could not show a genuine and serious fear of cancer because no physician ever told him he had an increased risk of cancer); *Stewart v. CSX Transp.*, 602 S.E.2d 665, 666 (Ga. App. 2004) (no error in trial court's excluding fear of cancer damages because jury found plaintiff did not have asbestosis); *Dobran v. Franciscan Med. Ctr.*, 102 Ohio St. 3d 54, 806 N.E.2d 537, 540 (Ohio 2004) (emotional distress damages not allowed under *Ayers* without a physical injury or proof of presence in "zone of danger").

In short, courts are faithfully following the *Ayers* admonition that its holding is *specifically and only* directed to the substantive elements of fear of cancer damages in a physical injury case. *Ayers*, 538 U.S. at 158. There is no conflict this Court must resolve, nor even the slightest disagreement as to the holding in *Ayers*.

B. Union Pacific's Proposed Instructions Were Not Appropriate under *Ayers*.

Even if the Court found Union Pacific's novel request for a "genuine and serious" jury instruction to be credible, this is not an appropriate case to consider that question since the result in this case would have been no different. And, far from following *Ayers*, Union Pacific's instructions contradicted this Court's opinion.

The trial court in *Ayers* had instructed the jury that: "[A]ny plaintiff who has demonstrated that he has developed a reasonable fear of cancer that is related to proven physical injury from asbestos is entitled to be compensated for that fear as a part of the damages you may award for pain and suffering." *Ayers*, 538 U.S. at 143. The trial court rejected the railroad's proposed instruction which would have disallowed fear of cancer damages unless the claimant proved both "an actual likelihood of developing cancer" and "physical manifestations" of the fear. *Id.* The Court affirmed the rejection of this instruction. *Id.* at 158-59.

Yet here, Union Pacific urged the trial court to give an instruction much like the railroad's *rejected* instruction in *Ayers*. First, rejected Instruction A would have required the jury to determine on its own whether fear of cancer is an "actual injury." Pet. App. 81a. However, the Court had already decided this in *Ayers*: "Accordingly, we hold that mental anguish damages resulting from the fear of developing cancer may be recovered under the FELA by a railroad worker suffering from the actionable injury asbestosis caused by work-related exposure to asbestos." 538 U.S. at 141.

As this Court stated: "Heightened vulnerability to cancer . . . 'must necessarily have a most depressing effect upon the injured person. Like the Sword of Damocles,' he knows it is there, but not whether or when it will fall." *Id.* at 150 (quoting *Alley v. Charlotte Pipe & Foundry Co.*, 159 N.C. 327, 331, 74 S.E. 885, 886 (1912)). With this clear recitation of FELA law on fear of cancer damages, the Missouri court would have no reason to submit to a jury whether the fear is an "actual injury."

Rejected Instruction A also would have asked the jury to consider whether plaintiff suffered physical symptoms of the fear, when *Ayers* made clear that these were unimportant to a fear of cancer already deriving from the medical diagnosis of asbestosis. 538 U.S. at 149.

The only other instruction on fear of cancer offered by Union Pacific also was not authorized by *Ayers*. Rejected Instruction B, like Instruction A, asked the jury to debate what *Ayers* had already decided: whether fear of cancer is an emotional injury to an asbestosis victim. Again, this instruction referenced physical symptoms in violation of *Ayers*. Pet. App. 83a. Neither rejected Instruction A nor B is supported by the substantive holding in *Ayers*.

Finally, there is no reason to believe that the outcome of this case would have been different had Union Pacific submitted an instruction at least arguably consistent with *Ayers*, and the trial court given it. The jury was instructed that Mr. Hedgecorth bore the burden of proof to establish his damages, MAI 3.01, and that any future damages awarded must be "reasonably certain" to occur. MAI 8.02. Damages presently sustained or reasonably certain to ensue, such as those due to Mr. Hedgecorth's demonstrated fear of cancer, can hardly be considered less than "genuine."

C. Denying This Writ Would Be Consistent With This Court's Precedent Favoring State Jury Verdicts Issued In Accordance with FELA and State Procedural Law.

FELA cases tried in state courts are governed by state procedural rules, and the form of instructions in such cases is "a procedural matter governed by the law of Missouri." *Meredith v. Missouri Pacific R.R. Co.*, 467 S.W.2d 79, 82 (Mo. 1971). Instructions approved by the Missouri Supreme Court, where applicable, are "mandatory to the exclusion of all others." *Griffith v. St. Louis San Francisco Railway Co.*, 559 S.W.2d 278, 290 (Mo. App. 1977). Naturally, approved Missouri instructions are not binding to the extent they misstate the applicable substantive law. *Clark v. Missouri & Northern Arkansas R.R. Co.*, 157 S.W.3d 665, 671 (Mo. App. 2004).

The court below recognized that the approved FELA damage instruction, MAI 8.02, was applicable and did not misstate the substantive law. Pet. App. 18a. As to Union Pacific's claim that a separate instruction was needed on fear of cancer, the court applied the Missouri state-law principle to allow counsel to argue the appropriate elements of damage, including emotional distress damages, rather than instruct on particular subcategories of damages. *Id.* at 17a-18a.

Recently, this Court held in *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. __, 127 S.Ct. 799 (2007) that Missouri jury instructions must utilize the same causation standard for both railroad negligence under Sec. 1 of the FELA and employee contributory negligence under Sec. 3. In so holding, the Court refrained from mandating a particular instruction, stating: "As a review of FELA model instructions indicates, n.2, *supra*, there are a variety of ways to instruct a jury to apply the

same causation standard to railroad negligence and employee contributory negligence. Missouri has the same flexibility as the other states in deciding how to do so, so long as it now joins them in applying a single standard." 127 S.Ct. at 801. Missouri has exercised that flexibility, while properly applying the single FELA standard here, just as other courts have done.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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